INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

ROBERT DEMARIO JEWELRY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on November 7, 1958.

OPINIONS BELOW

The Findings, Conclusions and Decree of the District Court (R. 6–12)[1] are not officially reported (13 WH Cases 709). The opinion of the Court of Appeals (App. A, *infra*, pp. 15–26) is reported at 260 F. 2d 929.

[1] "R." references are to the transcript of record as printed for the use of the Court of Appeals, copies of which have been filed with the Clerk.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1958 (App. A, *infra*, p. 26). By order of Mr. Justice Black, dated January 23, 1959, the time for filing a petition for a writ of certiorari was extended to and including March 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in an action by the Secretary of Labor under Section 17 of the Fair Labor Standards Act, the district courts have power, ancillary to the authority "to restrain * * * violations", to order reimbursement for loss of wages resulting from the discriminatory discharge of employees in violation of the Act.

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are set forth in full in Appendix B, *infra*, pp. 27–29. The provisions particularly involved are Sections 15(a)(3) and 17, which read as follows:

> SEC. 15. (a) * * * [I]t shall be unlawful for any person—
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> * * * * *
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> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has

served or is about to serve on an industry committee; * * *.

* * * * *

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin the respondents from discriminating against their employees in violation of Section 15(a)(3) of the Act, and to require them to reinstate three employees discharged in violation of that section, and to reimburse them for wages lost as a result of the wrongful discharges.

On November 14, 1956, respondents were convicted, upon a plea of guilty in a criminal action, of having violated the Fair Labor Standards Act by underpaying their employees and failing to keep proper records (M.D. Ga. Criminal No. 4482). Two days later, they learned that the three employees involved in this case had requested the Department of Labor to bring suit for the amount of the underpayments

(Fdg. 3; R. 7). Respondent DeMario, "disturbed, excited and displeased with the three employees * * * because of their having authorized the bringing of * * * suit", protested to each of them in individual interviews held the same day (Fdg. 4; R. 8). "Because of the [respondents'] displeasure over the filing of * * * suit," they "immediately" entered upon a course of discrimination against the complaining employees, and two weeks later terminated their employment with the company (Fdgs. 6–10; R. 8–9).

The District Court found that "[t]he three named employees would not have been laid off if it had not been for the filing of said suits, or if they had been laid off they would have been reinstated long since" (Fdg. 10; R. 9).[2] It concluded that the respondents had thereby violated Section 15(a)(3) of the Act, which forbids discrimination against employees for resorting to the Act's procedures (Concl. 3, R. 10).

On these findings, the trial court issued a decree enjoining the respondents from violating Section 15(a)(3), and requiring them to offer reinstatement to the three employees. It declined, however, to order the respondents to reimburse the three employees for wages lost by them as a result of the respondents' unlawful conduct (Concl. 5; R. 10–11).

The Court of Appeals, in affirming the judgment, sustained the trial court's authority to issue the rein-

[2] At the trial, Mrs. Duke, one of the three employees, testified that she had been unemployed at all times since the discharge some ten months before, although she had actively sought employment and was at all times ready and able to work (Tr. 34–35, 297).

statement order as relief ancillary to the injunction expressly authorized by Section 17. It held, however, that the trial court had no corresponding authority to issue a reimbursement order "absent any expression in Congressional enactment or legislative history" (App. A, *infra*, p. 20).

In sustaining the denial of the reimbursement order, the Court of Appeals noted the enactment in 1949 of the proviso in Section 17 expressly denying jurisdiction to issue specified types of orders for the payment of restitution to employees (App. A, *infra*, p. 20).[3] However, the court recognized that the proviso, in terms, deals solely with amounts owed on account of underpayments (App. A, *infra*, p. 23), and expressly disclaimed reliance on the proviso as a ground of decision. The court rested its decision upon its view that, even before the proviso was adopted, there was no jurisdiction to grant reimbursement orders for losses resulting from discriminatory discharges. (App. A, *infra*, p. 25).

REASONS FOR GRANTING THE WRIT

In holding that this type of reimbursement order is not available in equity proceedings under Section 17, the decision below is in direct conflict, as the Court of Appeals recognized, with the ruling of the Court of

[3] Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 920. The proviso reads: "*Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

Appeals for the Second Circuit in *Walling* v. *O'Grady*, 146 F. 2d 422.[4] It is also incompatible with the principle, underlying a number of decisions of this Court, that in the exercise of jurisdiction granted by a statute to restrain violation of its provisions "all the inherent equitable powers of the District Court are available" unless there is explicit legislative command to the contrary (*Porter* v. *Warner Co.*, 328 U.S. 395, 397–398).

The issue presented is of major importance in the administration of the Fair Labor Standards Act, since effective enforcement of the wage-and-hour provisions is virtually dependent on the freedom of employees to participate as complainants and witnesses without fear of economic loss at the hands of their employer. In view of the intimidatory pressures inherent in the employment relationship, of which this Court has on several occasions taken note (see *infra*, pp 13–14), Congress has explicitly forbidden the employer to discriminate against employees for filing complaints or giving testimony under the Act. Section 15(a)(3), *supra*, pp. 2–3. The decision below, if permitted to stand, would vitiate the force of this provision by withdrawing from potential complainants and witnesses the assurance that financial damage resulting from employer retaliation could be undone by process of law. The decision below would thus subject the enforcement of the Act to the powerful obstructive influence which Section 15(a)(3) was intended to eliminate.

[4] A reimbursement order for losses due to discriminatory discharge was recently issued in *Mitchell* v. *Equitable Beneficial Co.*, D. N.J., January 17, 1958, 13 WH Cases 564, not officially reported.

1. The proposition laid down by the court below that there is no power to issue reimbursement orders in equity proceedings under Section 17 was squarely presented to the Court of Appeals for the Second Circuit in *Walling* v. *O'Grady,* 146 F. 2d 422, and was there rejected. Contrary to the express premise of the decision below that "absent any expression in congressional enactment or legislative history" there was no power to issue reimbursement orders, the Second Circuit ruled that a "statutory mandate spelling out all the details of relief necessary for the purpose in hand" was not required; and that authority to order reimbursement for wages lost through discriminatory discharge was within the equity jurisdiction conferred by Section 17 as "a necessary power adequately to carry out the prohibition of the Fair Labor Standards Act." Such reimbursement, it held, was as necessary "to restore the status quo interfered with by the unlawful conduct of the employer" as it was in *Texas & N.O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U.S. 548, affirming 33 F. 2d 13 (C.A. 5), in which an order for reinstatement with back wages had been sustained under a statute that contained no provision therefor (the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577). The Second Circuit further cited, as analogous, the decision of this Court in *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, where an order was sustained requiring an employer to reimburse rejected *applicants* for wages lost as a result of discriminatory rejection, although the statute's provision for reim-

bursement referred only to the reimbursement of discharged *employees* for wages lost as a result of discriminatory discharge (National Labor Relations Act, par. 10(c), c. 372, 49 Stat. 454).

2. Although the *O'Grady* case was decided before the 1949 Amendments to the Fair Labor Standards Act, the decision below explicitly refrains from reliance upon respondents' contention that the requested order is barred by the proviso added to Section 17 by the Amendments (App. A, *infra,* p. 23). It recognizes that "the 1949 amendment dealt solely with the minimum wage and overtime compensation provisions," and grounds its conclusion on the premise that, contrary to *O'Grady,* there had never been power to order reimbursement. The court appears, nevertheless, to have been influenced by the proviso, since it expresses the view that Congress intended by the proviso "to repudiate the doctrine of the *O'Grady* case" (App. A, *infra,* p. 23). This view of the Congressional purpose in enacting the proviso is, we submit, manifestly erroneous.

The proviso (*supra,* p. 3) was enacted shortly after the decision in *McComb* v. *Scerbo & Sons,* 177 F. 2d 137 (C.A. 2), in which an order was issued requiring the employer to make reimbursement for unpaid minimum wages and overtime compensation. There had been several previous cases in which orders for the reimbursement of such deficiencies were issued.[6] The

[6] *Fleming* v. *Alderman,* 51 F. Supp. 800 (D. Conn.); *Walling* v. *Miller,* 138 F. 2d 629 (C.A. 8), the majority opinion sustaining the order on the ground that the employer had waived any objection he might have below, the concurring opinion upholding the order on the same reasoning as *Scerbo; Fleming* v. *Warshawsky*

report of the Conference Committee on the 1949 Amendments referred to these decisions in explaining that the proviso would have the effect of reversing "such decisions as *McComb* v. *Scerbo.*"[6] The report makes no mention of the *O'Grady* decision in which reimbursement was ordered for losses resulting from an unlawful discriminatory discharge. Consistently, the proviso is precisely formulated to cover the *Scerbo* type of case, referring only to damages for "unpaid minimum wages or unpaid overtime compensation," and containing no language susceptible to interpretation as covering damages for unlawful discharge. That the language was designed only for the restricted purpose specifically articulated is confirmed by the conferees' explanation that the proviso had been inserted in conference "in view of" the simultaneous insertion of a new Section 16(c) (App. B, *infra* pp. 28–29) authorizing the Secretary of Labor to bring suit upon request by employees to recover "unpaid minimum wages or unpaid overtime compensation under section 6 and section 7 of this Act". Section 16(c) provided no such substitute remedy for damages for discriminatory discharge under Section 15(a)(3).[7]

& *Co.*, 123 F. 2d 622 (C.A. 7), enforcing a consent decree containing such an order. This Court reserved the question in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193.

[6] Statement of the Managers on the part of the House, Rept. No. 1453 on H.R. 5856, 81st Cong., 1st Sess., p. 32. See also Report of the Majority of the Senate Conferees, 95 Cong. Rec. 14879.

[7] Even the provision in Section 16(b) for direct suits by the employee, which antedates the proviso in Section 17, is in terms limited to suits for unpaid minimum wages and overtime compensation. *Bonner* v. *Elizabeth Arden, Inc.*, 177 F. 2d 703, 705

It is evident from this legislative history that the new proviso in Section 17 and the new Section 16(c) were intended to balance each other, and that recourse to equity was being withdrawn to the extent that recourse to law was being provided. The legislative history thus confirms the unambiguous language of the proviso and shows it to be inapplicable to discrimination cases, where there is no counterpart legal remedy.

3. In rejecting *O'Grady* as wrongly decided, the decision below proceeds on the explicit premise that power to order reimbursement in a proceeding to restrain violations of the Act "must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment" (App. A, *infra*, p. 22). In so ruling, it runs directly counter to the established principle underlying numerous decisions of this Court that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied" (*Porter* v. *Warner Co.*, 328 U.S. 395, 398).

In accordance with this principle, a variety of mandatory corrective orders have been held to be within the power of the courts as relief ancillary to injunction, although not supported by affirmative statutory authorization. The *Porter* case established the power to require reimbursement of amounts charged as rent in excess of the maxima established under the Emer-

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(C.A. 2); *Powell* v. *Washington Post Co.*, D.D.C., October 1, 1958, 13 WH Cases 852, not officially reported.

gency Price Control Act of 1942.[8] The power to direct reinstatement, with back pay, of employees discharged in violation of the Railway Labor Act was sustained in *Texas & N. O. R. Co.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548, affirming 33 F. 2d 13 (C.A. 5), see *supra,* p. 7. In *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, a decree was upheld requiring compliance with an order of the National Labor Relations Board directing an employer to hire, with back pay, applicants rejected in violation of the National Labor Relations Act (see *supra,* p. 7).[9] And orders

[8] 56 Stat. 23, 50 U.S.C. App. (1946 ed.) 925(a) The decision below seeks to distinguish *Porter* on the ground that the express authorization of an "injunction [or] restraining order" in Section 205(a) of the Price Control Act is followed by the words "or other order." In doing so, the decision ignores the explicit reasoning in *Porter* that since "the Administrator [had] invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance," and since "[s]uch a jurisdiction is an equitable one," it followed that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction" (328 U.S. at 397–398). Compare the decisions of the Courts of Appeals for the Ninth and Third Circuits, which recognized *Porter* as holding that the restitution order therein was sufficiently grounded as "an equitable adjunct to an injunction," the Ninth Circuit adding "i.e. under the inherent equity powers of the court." *Woods* v. *McCord,* 175 F. 2d 919, 921 (C.A. 9); *McCoy* v. *Woods,* 177 F. 2d 354, 355 (C.A. 4).

The court below also relied (App. A, *infra,* p. 25) on *United States* v. *Parkinson,* 240 F. 2d 918 (C.A. 9), for the proposition that *Porter* was obsolete since it dealt with a wartime measure. But *Porter* plainly cannot be so limited.

[9] To the objection in *Phelps Dodge* that, while the statute expressly authorized back pay for employees unlawfully discharged, it said nothing about back pay for applicants unlawfully rejected, the Court replied: "Even without such a mandate

have repeatedly been upheld under the Sherman Anti-Trust Act requiring divestiture and similar affirmative corrective measures. *International Boxing Club* v. *United States,* No. 18, this Term, decided January 12, 1959, slip opinion, pp. 10–20; *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110, 126–130; *United States* v. *Paramount Pictures, id.* 131, 170–174; *United States* v. *Griffith, id.* 100; *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 189–190; *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 78. Although the express authorization in the Sherman Act is merely "to prevent and restrain violations" (Section 4, 26 Stat. 209; 15 U.S.C. 4), the Court has held that the function of the district court "does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy [but] includes undoing what the conspiracy achieved"; for "[o]therwise, there would be reward from the conspiracy through retention of its fruits." *United States* v. *Paramount Pictures,* 334 U.S. at 171.

The rationale of these cases is clearly applicable to the Fair Labor Standards Act. To limit the court's function in equity proceedings under that Act to the issuance of an injunction against discrimination and a reinstatement order would permit the employer to retain the fruits of his unlawful conduct no less than in the anti-trust cases. For the return of the em-

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from Congress [expressly authorizing affirmative relief] this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the Railway Labor Act [*Railway Clerks* case]" (313 U.S. at 188).

ployee to the plant, without remedy for the out-of-pocket loss unlawfully imposed upon him by the employer, would be a clear demonstration to all employees that resort to the procedures of the Act was prohibitively costly. The decisions of this Court leave no doubt that, in proceedings in which "the public interest is involved," the bounds of equitable relief "assume an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Co.*, 328 U.S. 395, 398; *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515, 552.

4. The issue is, we submit, one of great importance. The provisions of the Fair Labor Standards Act regulate week-to-week wage transactions between a vast number of business establishments and many millions of individual employees. It is obviously not feasible, and would certainly not be consistent with our national traditions, for compliance with the requirements of the Act to be policed by continuous governmental inspection of all payrolls. Enforcement must therefore depend mainly on the filing of complaints and the submission of information by employees who believe they have been denied their rights under the Act. This pattern of enforcement is workable only if the aggrieved employee feels free to approach the enforcement authorities with his complaint.

The Court has on several occasions noted that the economic dependence of employees on continued employment severely inhibits individual protest against substandard labor conditions. See *Holden* v. *Hardy*, 169 U.S. 366, 397; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 394; and *Brooklyn Bank* v. *O'Neil*, 324

U.S. 697, 706–708. To remove this inherent and powerful deterrent against cooperation with the enforcement authorities, Section 15(a)(3), *supra*, pp. 2–3, specifically declares it illegal to discriminate against an employee for asserting his rights under the Act. The decision below, however, blunts the point of this provision by declaring that a complaining employee who has been discharged in retaliation may be entitled, at the most, to start work again after a period of unemployment of unpredictable duration without relief for the out-of-pocket loss he has sustained. With assurance so limited, it may be expected that only the most courageous or perhaps only the foolhardy will be willing in the future to protest against violations of the Act. The decision below thus imposes a considerable burden upon the administration of the Act.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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MARCH 1959.

APPENDIXES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17068

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, Appellant and Cross-Appellee

versus

ROBERT DEMARIO JEWELRY, INC. and ROBERT DEMARIO, an Individual, Appellees and Cross-Appellants

(AND REVERSE TITLE)

Appeal and Cross-Appeal from the United States District Court for the Middle District of Georgia

(November 7, 1958)

Before HUTCHESON, *Chief Judge,* and TUTTLE and JONES, *Circuit Judges.*

JONES, *Circuit Judge:* The Secretary of Labor brought suit in the United States District Court for the Middle District of Georgia, invoking the jurisdiction conferred by Section 17 of the Fair Labor Standards Act,[1] against Robert DeMario Jewelry,

[1] "The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have jurisdiction, for cause shown, to restrain violations of section 15; *Provided*, that no court shall

Inc., a corporation, and Robert DeMario who controlled the corporation and owned most of its stock. It was charged by the Secretary that three employees of the jewelry company had been wrongfully discharged in violation of Section 15 of the Act[2] for having complained to the Secretary that they were not receiving minimum wages. In addition to seeking an injunction, in general terms, against violations of Section 15(a)(3) of the Act, the Secretary prayed that the appellees be required to reinstate the three discharged employees and to reimburse them for wages lost as a result of the wrongful discharges.

The district court entered its decree ordering the reinstatement of the three discharged employees. The district judge indicated a doubt as to whether the court had any power to decree reimbursement for lost wages but found it unnecessary to determine this question "inasmuch as in the exercise of the Court's discretion such would not be ordered even assuming, without deciding, that the Court would have jurisdiction to order such reimbursement." The Secretary has appealed and urges that the district

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have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action." 29 U.S.C.A. § 217.

[2] "(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

* * * * *

(3) To discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; * * *." 49 U.S.C.A. § 215.

court erred in refusing to direct the appellees to make reimbursement to the employees for wages lost as a result of their wrongful discharge. The Secretary designated for printing only those portions of the record consisting of the Complaint, the Answer, and the Findings of Fact, Conclusions of Law and Decree. The appellees, saying that the record on appeal is not sufficient to permit a determination of whether there was an abuse of discretion in denying reimbursement, move that the appeal be dismissed.

The printed record is sufficient for our disposition of the case. If the appellees believed that the portion which the appellant designated for printing was inadequate, the rules of this Court provide the method by which other portions of the record may be included. 5th Cir. Rule 23.

Section 17 of the Fair Labor Standards Act, as originally enacted, merely conferred jurisdiction upon the district courts to restrain violations of Section 15 of the Act. The limiting proviso was not then a part of the statute. The Eighth Circuit Court of Appeals sustained a consent decree in a suit by the Wage and Hour Administrator directing payment to employees of the defendant of the difference between wages paid and the amount payable at the prescribed minimum hourly and overtime rates. *Walling* v. *Miller,* 8th Cir. 1943, 138 F. 2d 629, cert. den. 321 U.S. 784, 64 S. Ct. 781, 88 L. Ed. 1076. Doubt was expressed as to the authority of the administrator to maintain the suit, but it was found unnecessary to decide the question. One of the judges, in an opinion concurring specially, expressed the opinion that the power given to district courts to restrain violations included the power to direct payments of wage deficiencies unlawfully withheld. Thereafter it was held by the Second Circuit Court of

Appeals that in a proceeding brought under Section 17 for the reinstatement of wrongfully discharged employees the court had inherent power to enforce payment of wages lost by the discharge. *Walling v. O'Grady,* 2nd Cir. 1944, 146 F. 2d 422. In support of its decision the court cited and relied upon *Texas & N.O. R. Co.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; *Phelps Dodge Corporation* v. *N.L.R.B.,* 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217; and the specially concurring opinion in *Walling* v. *Miller, supra.*

The O'Grady case was followed in the Second Circuit by *McComb* v. *Frank Scerbo & Sons,* 2nd Cir. 1949, 177 F. 2d 137, in which it was held that the district courts had power, in a suit to restrain violations of the minimum wage and hour provisions of the Act, to order restitution of overtime wages. In the opinion of the court it followed, and it recited in its opinion that it was following, its O'Grady case. It quoted from the special concurrence in *Walling* v. *Miller, supra.* The authorities relied upon in the O'Grady case were cited and also the intervening decision in *McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187, 69 S. Ct. 497, 93 L. Ed. 599. Cf. *Brotherhood of Ry. & S.S. Clerks* v. *Texas & N.O. R. Co.,* 25 F. 2d 876, affirmed 33 F. 2d 13. The Texas & N.O. R. Co. case and *McComb v. Jacksonville Paper Co.* case involved situations where prior decrees, framed to act prospectively, had not been complied with and contempt proceedings had thereafter been instituted. In the *McComb* v. *Jacksonville Paper Co.* opinion it was said "We can lay to one side the question whether the Administrator, when suing to restrain violations of the Act, is entitled to a decree of restitution for unpaid wages." It is hornbook law that in a contempt proceedings for the violation of an injunction

the court may ascertain damages for the breach and enter judgment for such damages. 12 Am. Jur. 430–432, Contempt § 62. The power of Federal courts to enforce decrees and punish by contempt for their breach is expressly recognized in Rule 70, Fed. Rules Civ. Proc., 28 U.S.C.A. Cf. *National Drying Machinery Co.* v. *Ackoff*, 3rd Cir. 1957, 245 F. 2d 192, cert. den. 355 U.S. 832, 78 S. Ct. 47, 2 L. Ed. 2d 44; *Phelps Dodge Corp.* v. *N.L.R.B.* involved the provision of the National Labor Relations Act, 29 U.S.C.A. § 160(c), authorizing the Labor Board, under the circumstances stated by the Congress, "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of" that Act. No such power is conferred on the courts by Section 17 of the Fair Labor Standards Act.

By the Fair Labor Standards Amendments of 1949, 63 Stat. 910, 920, Section 17 was amended by adding the proviso,

> That no court shall have jurisdiction, in any action brought by the Administrator [Secretary of Labor] to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

For the Secretary the inference is drawn that this amendment recognizes the power of district courts to order restitution in an injunction decree ordering reinstatement of wrongfully discharged employees. For the jewelry company employer it is said that the amendment negatives any such inference and, on the contrary, shows a Congressional recognition of the non-existence of such power as is claimed by the Secretary for the courts. The Conference Committee, in its report, discussed the purposes and effect of the

amendment to Section 17.[3] In the drafting of the 1949 Act there was included as Section 16(c) the provision that, with the exceptions stated, the Administrator, now the Secretary, could sue with the consent of the employees for unpaid minimum wages and unpaid overtime compensation. Thus was created a cause of action in the Secretary. Suits by him under the statute are, in effect, suits by the United States. *Walling* v. *Norfolk Southern Ry. Co.*, 4th Cir. 1947, 162 F. 2d 95; *Walling* v. *Frank Adam Electric Co.*, 8th Cir. 1947, 163 F. 2d 277; *Mitchell* v. *Floyd Pappin & Son*, D.C. Mont. 1954, 122 F. Supp. 755. Section 17 denies to the courts any power to order payment of minimum wages and overtime to employees in the Secretary's suit to enjoin violations of Section 15. The Congress could have given but did not give to the Secretary any cause of action to sue for restitution on behalf of wrongfully discharged employees. Are we to assume, absent any expression in congressional enactment or legislative history, that Congress intended by implication to give the Secretary acting on behalf of the United States, such a cause of action? We think not.

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[3] "The House bill adopted the language of section 17 of the act without change. The Senate amendment altered this section to include a more precise description of the United States courts having jurisdiction of actions to restrain violations. The legal effect of both versions was the same. The conference agreement adopts the Senate version with a proviso to the effect that no court shall have jurisdiction, in any action brought by the Administrator to restrain violations of section 15, to order payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages. This proviso has been inserted in Section 17 of the act in view of the provision of the conference agreement contained in section 16(c) of the act which authorizes the Administrator in certain cases to bring suits for damages for unpaid minimum wages and overtime compensation owing to employees

The Secretary has expressed a doubt that a wrongfully discharged employee has a cause of action, enforceable in a Federal Court, to recover for losses resulting from a wrongful discharge. The Second Circuit Court of Appeals has held, in a case arising before the 1949 amendment, that the employee had no right which he could assert in a Federal forum.[4] We do not feel any necessity for deciding whether or not the employee has a cause of action. If he has, then without congressional authority the Federal courts cannot, at the suit of the Secretary, enforce his cause of action. The employee would be the real

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at the written request of such employees. Under the conference agreement the proviso does not preclude the Administrator from joining in a single complaint causes of action arising under section 16(c) and section 17. Nor is it intended that if the Administrator brings an action under section 16(c) he is thereby precluded from bringing an action under section 17 to restrain violations of the act. Similarly, the bringing of an injunction action under section 17 will not preclude the Administrator from also bringing in an appropriate case an action under section 16(c) to collect unpaid minimum wages or overtime compensation owing to employees under the provisions of the law. Nor is the provision intended in any way to effect the court's authority in contempt proceedings for enforcement of injunctions issued under section 17 for violations occurring subsequent to the issuance of such injunctions. The provision, however, will have the effect of reversing such decisions as *McComb* v. *Scerbo* ((C.C.A. 2) 17 Labor Cases No. 65,297), in which the court included a restitution order in an injunction decree granted under section 17." U.S. Code Congressional Service, 1949, p. 2273.

[4] "The dismissal of the second count was also necessary and proper since the Fair Labor Standards Act, *supra*, confers no jurisdiction upon the court over a civil action to recover damages for the discharge of an employee in violation of the statute. Such action must be redressed, if at all, by criminal proceedings in conformity with § 15(a)(3) of the Act." *Bonner* v. *Elizabeth Arden, Inc.*, 2nd Cir. 1949, 177 F. 2d 703.

party in interest. Cf. Rule 17(a) Fed. Rules Civ. Proc., 28 U.S.C.A. If the Secretary is seeking to enforce, on behalf of the United States or in his own right as Secretary, a cause of action vested in him, we must look for a congressional enactment which creates the cause of action. The right of the Secretary to seek and the power of the court to grant the relief which was denied by the district court must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment.

The effect of the amendment to Section 17 was the subject of an interesting comment arguendo in an opinion of the Ninth Circuit Court of Appeals where it was said:

> An attempt by the Administrator of the Wage and Hour Division to assert the power of collecting restitution was supported by various courts improvidently. [Citing *McComb* v. *Scerbo* and *Walling* v. *O'Grady*.] The Congress rebuked this attempt and in effect repealed the supporting decisions by amending the basic act expressly to forbid collection of restitution by the agency. *United States* v. *Parkinson*, 9th Cir. 1956, 240 F. 2d 918.

The report of the Conference Committee, *supra*, stated that the amendment to Section 17 was not intended "to affect the court's authority in contempt proceedings for enforcement of injunctions issued under section 17 for violations *occurring subsequent to the issuance of such injunctions.*" (Emphasis supplied.) This suggests that there was no power to grant restitution for violations occurring prior to the issuance of an injunction. It was the apparent intent of Congress in passing the 1949 amendment to Section 17, that it "will have the effect of reversing such decisions as *McComb* v. *Scerbo* * * * in which the court included a restitution order in an injunction decree

granted under section 17." The O'Grady case is not "such a case" as the Scerbo case in that Scerbo deals with overtime wages while O'Grady involved loss of wages due to a wrongful discharge. But the reasons for the decision in Scerbo are those announced in O'Grady, and the authority of O'Grady was, we think, the primary precedent relied upon in Scerbo. To that extent O'Grady was one, and perhaps the only one from an appellate court, of "such decisions as *McComb* v. *Scerbo.*" The O'Grady case was one "in which the court included a restitution order in an injunction decree granted under section 17," and in that respect the O'Grady case was one "of such decisions as *McComb* v. *Scerbo*". But the proviso added to Section 17 by the 1949 amendment dealt solely with the minimum wage and overtime compensation provisions. Without expressly holding, therefore, because we find it unnecessary to do so, that the Congress intended, by the amendment, to expressly repudiate the doctrine of the O'Grady case although the report of the Committee points strongly in that direction, we have no hesitancy in saying that the reliance in the O'Grady case on the cases cited by it was misplaced and that we do not regard that decision as authoritative.

If the district courts have the authority to direct restitution to employees who have been wrongfully discharged in connection with an injunction directing reinstatement, such authority exists, we think, as an equitable power granted by implication as necessarily being an incident of or ancillary to the judicial power expressly conferred by the congressional act. The Secretary places reliance upon *Porter* v. *Warner Co.*, 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332. There the Administrator under the Emergency Price Control Act, 56 Stat. 23, brought a suit to enjoin the collection of rents in excess of the permitted maxi-

mum, and to require the defendant property owner to tender to his tenants the excess rents he had collected. The Act gave tenants a cause of action for treble damages. The courts were authorized, upon application of the Administrator to grant "a permanent or temporary injunction, restraining order, or other order." The Supreme Court found that district courts could enter orders directing restitution. It quoted from a Senate Committee report a statement that the "courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case." This, said the Supreme Court, "is an unmistakable acknowledgment that courts of equity are free to act under § 205(a)[5] in such way as to be most responsive to the statutory policy of preventing inflation", 328 U.S. 401. Thus it appears that by authorizing the entry of an "other order", a broad general power to grant equitable relief was conferred by Congress. The general equitable power, said the Supreme Court, is not to be denied unless the statute expressly or by a necessary inference restricts the court's jurisdiction in equity. Of the Price Control Act, and the Porter decision construing it, the Ninth Circuit Court of Appeals has observed:

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[5] "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." 56 Stat. 23, 33.

> The courts construed certain language of the Price Control Act to compel mandatory restitution. But this legislation was passed and interpreted in time of a struggle for national existence. These laws are now in abeyance and they constitute a doubtful precedent for the extension of enactments such as this which are intended to represent permanent policy in peaceful times as well." *United States* v. *Parkinson, supra.*

The excess rentals collected were moneys received by the landlord in violation of the express provisions of a statute or a Regulation issued pursuant to it. The situation is not unlike that of the employer in a contempt case who, in violation of a court order, prospective in its effect when entered, retains funds which belong to his employees. Here the right of recovery, if any right there be, is that of the wrongfully discharged employee to recover damages for the wrong done to him. No right to recover damages in such a case has been given to him or to the Secretary for him by the statute, nor does the statute contain language which indicates a recognition of any such right. There is, as has been indicated, a judicial determination denying the existence of any such right in the employee. We are unable to find or infer any intent of the Congress that the courts should have power, as an incident to an order directing reinstatement of discharged employees, to direct the payment of the damages resulting from the loss of wages. The meager indications of congressional purposes which we are able to glean from the Act and from the Committee Report indicate a contrary intent. In any event, we conclude that the doctrine stated in the O'Grady case, for which the Secretary here contends, is not expressive of the present state of the law.

The district court refrained from deciding whether it was authorized to require restitution of wages lost

by the discharged employees "inasmuch as in the exercise of the court's discretion such reimbursement would not be ordered even assuming, without deciding, that the court would have jurisdiction to order such reimbursement." If we had decided that the court was authorized to grant the relief of awarding the loss of wages damage to the employees it would have been necessary to review more of the record than is before us in order to determine whether or not there was an abuse of discretion in denying the relief sought. This question is not reached.

The appellee, subsequent to the argument of this appeal, has suggested that the district court was without power to issue an injunction directing the reinstatement of the employees who were wrongfully discharged. The suggestion is without merit.

The decree of the district court is

Affirmed.

JUDGMENT

Extract from the Minutes of November 7, 1958.

No. 17068

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

versus

ROBERT DEMARIO JEWELRY, INC., and ROBERT DEMARIO, an individual

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX B

The pertinent provisions of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949 and of 1955, c. 736, 63 Stat. 910; c. 867, 69 Stat. 711, 29 U.S.C. 201 *et seq.*, are as follows:

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) not less than $1 an hour; * * *.

MAXIMUM HOURS

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

PROHIBITED ACTS

SEC. 15. (a) * * * [I]t shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted

or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; * * *.

PENALTIES

* * * * *

SEC. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * *.

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: * * * The consent of any employee to the bringing of any such action by the Secretary, unless such action is dismissed without prejudice on motion of the Secretary, shall constitute a waiver by such

employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. * * *

INJUNCTION PROCEEDINGS

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.